

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

REBECCA FLOYD-TUNNELL, et al.,

Appellants,

v.

SHELTER MUTUAL INSURANCE COMPANY,

Respondent.

DOCKET NUMBER WD75725

Date: November 12, 2013

Appeal from:
Jackson County Circuit Court
The Honorable W. Brent Powell, Judge

Appellate Judges:
Court En banc: James E. Welsh, Chief Judge, Presiding, Joseph M. Ellis, Victor C. Howard,
Thomas H. Newton, Lisa White Hardwick, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell,
Cynthia L. Martin, Gary D. Witt and Anthony Rex Gabbert, JJ.

Attorneys:
James E. Corbett, Jr. and David T. Tunnell, Springfield, MO, for appellant.
William C. Drawford, Kansas City, MO and James P. Maloney, Kansas City, KS, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

COURT OF APPEALS -- WESTERN DISTRICT

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Before the Court En Banc: James E. Welsh, Chief Judge, Presiding, Joseph M. Ellis, Victor C. Howard, Thomas H. Newton, Lisa White Hardwick, Alok Ahuja, Mark D. Pfeiffer, Karen King Mitchell, Cynthia L. Martin, Gary D. Witt and Anthony Rex Gabbert, JJ.

Rebecca Floyd-Tunnell and Doris Floyd ("Appellants") appeal the circuit court's grant of summary judgment in favor of Shelter Mutual Insurance Company ("Shelter") on their claim to recover up to the uninsured motorist ("UM") coverage limits on two insurance policies for the wrongful death of Jerry Floyd. The two insurance policies insured vehicles that Jerry Floyd owned but was not driving at the time of the accident. The court determined that a partial exclusion in both policies limits Shelter's liability for UM benefits to Missouri's statutory minimum. On appeal, Appellants contend the partial exclusion does not apply or, alternatively, is unenforceable because it renders the policies ambiguous.

AFFIRMED.

Majority opinion holds:

(1) The circuit court did not err in finding that the partial exclusion in the insurance policies applies to limit Shelter's liability for UM benefits to the statutory minimum. The plain language of the partial exclusion limits UM coverage where any part of the damages, that is, the money owed to an insured for a death sustained by that insured and caused by the ownership or use of an uninsured motor vehicle, is sustained while the insured is in a vehicle that is owned by

any insured but is not the vehicle listed on the declarations page. Based on the policies as a whole, governing statutes, and caselaw, the only reasonable interpretation of this language is that, for purposes of determining the extent of UM coverage available for the decedent's death, the term "the insured" refers to the decedent and not to those persons authorized to recover under Missouri's wrongful death statute, even if those persons are insured under the same policy. Because some part of the damages for which Appellants seek to recover were sustained while Jerry Floyd was occupying a motor vehicle that he owned but was not the vehicle listed on the declarations page of either of the two policies, the partial exclusion applies to limit UM coverage under the policies to the statutory minimum.

(2) The circuit court correctly found that the partial exclusion does not render the policies ambiguous. The section of each policy that discusses UM coverage notifies the policyholder that the coverage is subject to exclusions and limitations; the insuring agreement for UM coverage reiterates the existence of exclusions and limitations; and the partial exclusion is contained within the UM coverage section and clearly states that, in the situations listed, Shelter's limit of liability for UM coverage is the statutory minimum. When the policies are read as a whole, the partial exclusion is not susceptible to different interpretations and does not cause the meaning of the policies to be uncertain.

Dissenting Opinion would hold:

The majority's construction of the insurance policies applies *liberal* instead of *strict* construction of the applicable exclusion clause relied upon by the insurance company that drafted the policies, which is not permitted under Missouri law.

The insurance policies at issue are hopelessly irreconcilable when considering the application of Missouri's wrongful death laws. As the insuring agreement and the exclusionary clauses are written in the policies, the damages contemplated for an uninsured-motorist death claim compensate physical injury losses owed to the decedent, not the pecuniary damages set

forth in section 537.090 that are owed to the statutory death beneficiaries as stated in section 537.080. The persons entitled to recover damages from uninsured motorists because of death are the statutory beneficiaries, not the decedent or the decedent's estate. As such, because uninsured motorist coverage is mandatory, the statutory requirements must supersede the offending policy language. And, when applying the exclusion clause to the person or persons "owed" monetary compensation for the subject wrongful death claim, it is plainly inapplicable; or, at minimum, the exclusion clause is reasonably susceptible to more than one interpretation (i.e., ambiguous), one of which results in inapplicability of the exclusion clause. Either way, when *strictly* construed against the drafter of the insurance policy, the exclusion clause is inapplicable to appellants' uninsured motorist claims.

The dissent would reverse the trial court's judgment in favor of Shelter Insurance.

Concurring Dissenting Opinion would hold:

I concur in that part of the dissenting opinion holding that the UM exclusion clause is ambiguous, in that, in the context of the whole policy, it is reasonably and fairly open to different constructions. For that reason, I concur in the dissenting opinion's conclusion that the circuit court erred in granting Shelter's motion for summary judgment and in denying Appellants' cross-motion for summary judgment and that the case should be reversed and remanded for further proceedings.

Majority Opinion by Lisa White Hardwick, Judge
Dissent by Mark D. Pfeiffer, Judge
Concurring Dissenting Opinion by Joseph M. Ellis, Judge

November 12, 2013

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